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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

G. C. TEMPLETON, JR. and
MARY PAT TEMPLETON,

Petitioners,

v.

ARSENAL SAVINGS ASSOCIATION,

and

UNITED STATES OF AMERICA,

[redacted]

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause impose an affirmative duty on state trial judges to disclose to civil litigants all extra-judicial facts which may cause a reasonable and prudent person to question the judge's impartiality and neutrality?

2. Assuming that a litigant has been denied due process of law because the trial judge was not impartial or neutral or because the appearance of impartiality or neutrality was lacking, must the litigant show actual harm before being entitled to a new trial?

3. Does the Due Process Clause require a state trial judge to allow a litigant to perform discovery on the issue of a judge's bias and to afford the litigant the opportunity at an evidentiary hearing to prove either that the trial judge is actually biased for or against a party, or that the appearance of the judge's impartiality and neutrality is lacking where some evidence of the appearance of partiality has been presented?

## PARTIES

All parties are identifed in the caption. The only parties having an interest in this Petition are Arsenal Savings Association, G. C. Templeton, Jr., and Mary Pat Templeton.

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| 28 U.S.C. 1257(3) | |

# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioners, G. C. Templeton, Jr. and Mary Pat Templeton respectfully pray that a Writ of Certiorari issue to review the decision of the Supreme Court of Indiana. That Court decided not to review the decision of the Court of Appeals of Indiana which had affirmed a judgment for Respondent Arsenal Savings Association.

## OPINIONS BELOW

The Marion Superior Court, entered a judgment and later amended it. The original judgment is found at Appendix A, and the amended judgment is found at Appendix B. The Court of Appeals of Indiana affirmed by written but unpublished decision, which is found at Appendix C. The Court of Appeals of Indiana denied without opinion Templetons' Petition for Rehearing. Its denial is found at Appendix D. The Supreme Court of Indiana denied without opinion Templetons' Petition for Transfer. Its ruling is found at Appendix E.

## JURISDICTION

The Supreme Court of Indiana denied Templetons' Petition to Transfer on January 10, 1984. The Court of Appeals of Indiana denied Templetons' Petition for Rehearing on August 29, 1983. The Court of Appeals of Indiana affirmed the trial court's judgment on July 11, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The Court of Appeals of Indiana decided, and the Supreme Court of Indiana let stand, special and important questions of federal law which have not been, but should be, settled by this Court, and decided federal questions in ways not in accord with applicable decisions of this Court. Those questions relate to whether the trial court deprived Templetons of their constitutional rights to due process of law.

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioners, G. C. Templeton, Jr. and Mary Pat Templeton, husband and wife, were sued by Arsenal Savings Association to collect on a promissory note and to foreclose a real estate mortgage securing that note. (Record at 2-6) Arsenal was represented by Merrill Moores, its general counsel for 26 years, (Record at 565) and his partner, John Price. (Record at 547, 285; *Appendix A-7*)

The mortgage provided that Arsenal was to notify Templetons of the conditions that would have to be met for reinstatement at anytime up to judgment. (Record at 10-11) Templetons received notices of certain sums of money due. (Record 512, 924, 943) While the case was pending Templetons sent two letters to Arsenal offering to bring all monthly payments current plus two months in advance and also requesting that Arsenal advise Templetons of any other reasonable charges or expenses that needed to be paid. (Record at 926, 289; *Appendix A11-14*, 942) The last notice Templetons received prior to trial, was a "past due notice" stating that the "total due" was $17,402. (Record at 731-732, 738, 943) The next day after receiving that notice (Record at 943) Templeton took $20,000 cash to the Chairman of the Board of Arsenal (Record at 738-744, 874, 291; *Appendix A*) who did not take the money. (Record at 743-745, 875) Templetons' agents took $20,000 cash to Arsenal's general counsel. He did not take the money. (Record at 851-868, 883-892, 292; *Appendix A-14*)

On all but the last day of trial Templetons' attorneys made statements on the record that they had the cash to give Arsenal to cure the alleged breach of the mortgage and the acceleration on behalf of Templetons. They did not display the cash. (Record at 491, 545-546, 633-634, 293; *Appendix A-16*) On the last day of trial, another month had passed, G. C. Templeton, Jr., while on the witness stand, displayed, offered and tendered $20,860.03 cash to reinstate the mortgage (Record at 750, 793-

796, 294; *Appendix A*) over the objection of Arsenal. (Record at 790-791, 795) Arsenal did not accept. (Record at 492-493, 546-547, 633-636, 796-797)

The harsh result against Templetons may have been motivated by bias, a predisposition for Arsenal, its attorney, or prejudice against Templetons, or all.

The trial court disallowed Templetons' efforts to file a counterclaim and affirmative defenses (Record at 68) even though the proposed counterclaim was tendered just nine days after Templetons had filed their answer in May, 1981 (Record at 45, 51) and even though Indiana law, like federal law, favors liberal amendments to pleadings. Templetons believed that Arsenal had failed to properly credit their account prior to the 1979 transaction. (Record at 806-810)

Templetons tried to assert and prove, in court and on the record, that Arsenal had erred, prior to the 1979 transaction being made, by failing to credit at least $72,800 to their account before arriving at the $150,000 claimed. (Record at 731, 806-808, 994-1030, 1100-1101) This would have reduced the $150,000 claimed to $77,200, or less. (Record at 731, 1100-1101) Arsenal objected, and the trial court refused to entertain any argument or proof on the position either as a counterclaim or defense. (Record at 525-527, 726-731, 810, 994-1030, 1034, 1100-1101)

At trial, Arsenal's treasurer was asked what were the principal, interest and any fees "to bring it up to date." (Record at 512-520, 539) The treasurer testified that the delinquent payments due at the time were $18,984 and specified only $152.03 as an additional amount due. (Record at 539) Also that various amounts owed, totaled $19,278.03. (Record at 512-520, 293; *Appendix A-15*)

Moores testified that if the court would not award attorneys fees, he thought he would be fired. (Record at 585) The decision of the trial court may have been motivated by a desire to preserve or protect Moores' position with Arsenal. The trial court's

original findings of fact and conclusions of law granted Arsenal a judgment of $204,724.83, which included attorneys fees of $36,000, (Record at 299; *Appendix A-21*) even though Arsenal's counsel had described the case as a simple mortgage foreclosure. Record at 42, 575)

After being challenged, the trial judge reduced the award of attorneys fees to $25,000, when ruling on Templetons' Motion to Correct Errors. (Record at 473-475, 1203) The judgment was thus reduced to $193,724.83. (Record at 473-475, 1203) Arsenal never challenged those decisions in the trial court or on appeal. The trial judge, in reducing the award, admitted that he had difficulty in determining how many hours Arsenal's attorneys had spent and on what projects (Record at 1203), but he did not give any calculation for the $25,000, which was still unreasonably large, nor explain how he could have made an $11,000 error. (Record at 1203, 302; *Appendix A-24)*

The trial judge made unnecessary and unsubstantiated disparaging remarks about Templetons, including a reference to G. C. Templeton, Jr. as "rich." (Record at 1102)

After trial, Templetons, on their own, became suspicious because of what they perceived to be an inequitable result in a court of equity. (Record at 325, 539) Templetons had made repeated inquiries both in and out of court, (Record at 539, 926, 942) to determine what Arsenal claimed was owed; they had made repeated offers and tenders, both in and out of court of what Arsenal said was owed. (Record at 491, 545-546, 633-634, 738-744, 750, 793–796, 851-852, 864-867, 874, 883, 891) Except for its "total due" $17,402 Notice, (Record at 731-732, 738, 943) Arsenal refused to receive money or otherwise cooperate in a reasonable manner. (Record at 743-745, 853-854, 859, 868, 875, 884, 886-888, 892) Instead of the judge fixing the amount necessary to cure any delinquency or instead of ordering a judgment for a relatively small amount, the judge issued a substantial judgment against Templetons (Record at 299; *Appendix A-21*), placed their family home in a receivership and

jeopardy of a sheriff's sale. (Record at 1204, 298; *Appendix A*)

Having received this inequitable judgment, Templeton, for his wife and himself, later, personally uncovered certain extrajudicial facts revealing personal connections between the trial judge and Arsenal, including Arsenal's general counsel. (Record at 359) On January 18, 1982, Templetons moved for a verified change of venue from the judge for cause (Record at 384) and filed a Motion to Correct Errors. (Record at 319) Templetons also submitted an affidavit in support of their verified Motion for Change of Judge. (Record at 400) Arsenal never filed affidavits to counter Templetons' affidavits nor refuted the allegations in court. (Record at 1139) The judge never denied any of Templetons' allegations of extrajudicial conduct and admitted most of them. (Record at 1143-1152)

Once in open court, Merrill Moores even referred to the court and himself (and/or Arsenal) as "us." (Record at 1139)

The following extrajudicial facts uncovered by Templetons after trial tend to substantiate that the rulings by the court were by a judge who either lacked fairness, impartiality and neutrality, or at least lacked the appearance of them:

1. The trial judge and Arsenal's counsel had been friends for several years and had worked together on at least three committees in the Indiana House of Representatives. (Record at 359)

2. Arsenal's counsel Merrill Moores had done business at least with corporations in which the trial judge had held offices and a directorship. (Record at 366, 368, 370, 1145)

3. Moores' daughter had recently been the bailiff of the trial judge. (Record at 359, 1146)

4. At the time of the trial, a director of Arsenal had been a close neighbor of the trial judge for fifteen years in a 15-house cul-de-sac subdivision. (Record at 371, 378, 379, 1146-1147)

5. Merrill Moores, as Arsenal's general counsel, was in essence a plaintiff, partly because he and his partner were "members" of Arsenal and listed as such on a document filed by Arsenal with the Indiana Secretary of State. (Record at 374)

Also, he sought $36,000 for himself and law partner. (Record at 2, 262) He even filed one pleading in his own name.

6. The trial judge had appointed Merrill Moores as special judge in at least one other case which was pending in the same court and at the same time as Arsenal's case against Templetons. *State ex. rel. Cleary v. Board of School Commissioners*, Ind.App., 438 N.E.2d 12 (1982).

7. During the trial, the trial judge characterized Templetons' conduct as a "charade" (Record at 635) and also said that "tender" had nothing to do with the lawsuit, when, in fact, it was a critical issue in the case. (Record at 635)

8. The trial judge appointed a receiver (Record at 302) when such receivership was not sanctioned by law; (Record at 1270-1277) only after being challenged did he later rescind the receivership when ruling on Templetons' Motion to Correct Errors, (Record 473-475, 1203) and held it "for naught". (Record at 473) The receiver had been a client of the trial judge when he was a practicing attorney. (Record at 407) The trial judge appointed Merrill Moores as attorney for the receiver. (Record at 315) The receiver is an officer of the court, and charged with being indifferent. *Lake Mortgage Co., Inc. v. Federal National Mortgage*, 159 Ind.App. 605, 308 N.E.2d 739, 745 (1974). An attorney should not be an attorney for the receiver and a creditor. *State ex rel. Makar v. St. Joseph County Circuit Court*, 242 Ind. 339, 179 N.E.2d 285, 290 (1962).

Templetons sought to depose Merrill Moores, Arsenal's president, Moores' daughter who had been the judge's recent bailiff, and the trial judge himself (Record 441, 451-458) in order to uncover new extrajudicial facts and to buttress those extrajudicial facts already uncovered. The trial judge disallowed all of Templetons' efforts to use discovery to substantiate their Motion for Change of Judge for cause and denied them an evidentiary hearing on their motion. (Record at 465, 468, 470, 1125, 1128-

1131, 1204) The judge said that the motion could only be based on affidavits (Record at 1129-1130), although it was obvious that each of the persons sought to be deposed was a hostile witness, and unlikely to provide an affidavit. Arsenal filed no counter affidavits. The judge admitted the truth of most of Templetons' allegations and denied none. (Record at 1143-1152) Then the judge declared himself to have made "efforts and attempts to be fair, unbiased and unprejudiced in this case," (Record at 1151-1152) denied all of Templetons' discovery attempts, and overruled Templetons' Motion for Change of Judge for cause. (Record at 1204)

The judge had ex parte conversations with lawyers and judges without revealing to Templetons their identities or the substance of the conversations. Templetons did not learn of the existence of those private conversations until the judge remarked about them on the record at the hearing on March 8, 1982. (Record at 1148-1149) Templetons still do not know who those persons were or the substance of the conversations.

Templetons first raised the constitutional issues in the trial court upon their filing of a Motion to Correct Errors and Request For Hearing, on January 18, 1982:

> The judgment should be vacated because Templetons were denied due process of law because of the association between the judge and Arsenal and Arsenal's attorney Merrill Moores (who also was a member of Arsenal). Neither the judge nor Arsenal's attorney made disclosure of their long relationship. The appearance of justice and impartiality was lacking; and the Templetons do not have the feeling or belief that they received a fair trial. The judge's impartiality might reasonably be questioned from these factors which are not necessarily exclusive. . . (Record at 321)

The Motion to Correct Errors was supported by Affidavits and a thirty-page brief.

Templetons preserved the error in their Brief of Appellants, filed with the Court of Appeals of Indiana on July 7, 1982, as exemplified by this heading:

> The Judgment Should Be Vacated Because Templetons Were Denied Due Process Of Law Because Of The Association Between The Judge And Arsenal's Attorney; The Court Should Have Voluntarily Disqualified Himself Or Granted Templetons' Motion For Change of Judge For Cause. (Brief of Appellant, p. 93)

That heading in the brief was followed by twelve pages of discussion. Included in the discussion were statements that the court had deprived Templetons "of their constitutional due process rights to a fair trial in a fair tribunal." The issue of due process was also discussed at pages 33-35 in the reply brief filed with the Court of Appeals on August 26, 1982.

The Templetons preserved the error in their Petition For Rehearing filed with the Court of Appeals on August 1, 1983. The petition stated in part:

> The Court of Appeals did not rule on whether the trial judge should have disqualified himself. Instead, the Court of Appeals erroneously held that Templetons' claims of a denial of due process of law failed because Templetons failed to show "some harm."...
>
> The Court of Appeals failed to rule on issues presented for review: namely, whether the judge was biased or partial, or whether Templetons were denied due process of law. If the judge was biased or partial or if the Templetons were denied a fair trial in a fair tribunal, harm ipso facto results. Otherwise, the right to a fair trial in a fair tribunal is a hollow right, not a constitutional right. Harm must be presumed.

Templetons preserved the issues in their Petition To Transfer which was filed with the Supreme Court of Indiana on September 19, 1983. The Petition in part stated:

> (k) . . .whether the Templetons were denied due process as guaranteed by the United States Constitution and the Constitution of Indiana. Such issue was argued in the Brief of Appellant at Pages 93-104, and presented in the Record at Pages 321, 349-353.
>
> (l) In erroneously deciding a new question of law, to-to-wit: that the Templetons' contention of denial of due process did not show harm or had to show harm.

Those issues were further discussed at pages 63-71 in Templetons' Brief In Support of the Petition for Transfer, which was also filed on September 19, 1983.

## REASONS FOR GRANTING WRIT

**THE COURT OF APPEALS OF INDIANA DECIDED, AND THE SUPREME COURT OF INDIANA LET STAND, SPECIAL AND IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAVE DECIDED FEDERAL QUESTIONS IN WAYS NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.**

The issues address the very integrity of our judicial system. Templetons contend that they were deprived of due process because the trial judge failed to disclose facts indicating his relationships with Arsenal and its counsel, which facts would cause a reasonable and prudent person to question the impartiality, fairness and neutrality of the judge. There must still be other extrajudicial facts, still unknown to Templetons; otherwise, the trial judge would have scant reason to prevent Templetons

finding them by using discovery. Templetons contend that they were deprived of due process when the trial judge barred them from discovery and from an evidentiary hearing on the issue of judicial bias and prejudice.

Templetons contend that the Due Process Clause imposes on state trial judges an affirmative duty to disclose to the parties all extrajudicial facts upon which a reasonable and prudent person could find that the judge may be biased, partial or not neutral. Templetons contend that the Due Process Clause requires a state court judge to hold an evidentiary hearing on a motion to test the judge's impartiality and neutrality. Although the Supreme Court has held that the Constitution imposes affirmative duties on state court prosecutors to make certain disclosures, upon policemen to disclose Miranda rights, and upon state judges to disclose ex parte conversations with jurors, it has yet to consider whether the Due Process Clause imposes an affirmative duty on state trial judges to disclose to civil litigants all extrajudicial facts upon which a reasonable and prudent person could have reason to doubt the judge's impartiality and neutrality. If trial judges have no affirmative duty to disclose extrajudicial facts, then every litigant walking through the courthouse door would be foolish to presume that the trial judge is forthright, fair, impartial and neutral. Instead, the careful litigant would have to presume that the judge was concealing his partiality and bias and would have to divert his attention from the merits of the case to the side issue of exploring for extrajudicial facts of the judge's partiality and bias.

The essence of due process is fairness. The Due Process Clause entitles a person "to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The tribunal must be neutral to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. 446 U.S. at 247. The requirement of neutrality also fosters the feeling that each participant be assured "that the arbiter is

not predisposed to find against him." *Ibid*. The requirement of neutrality has been "jealously guarded." *Ibid*. The Supreme Court stated it succinctly and eloquently in *In Re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge. . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law' " *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14.

In *In Re Murchison*, the Supreme Court was concerned with a defendant who was tried before a judge who had conducted a secret grand jury. In finding that the defendant's rights to due process had been violated, the Supreme Court ruled:

> Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. 349 U.S. at 138.

Had this been a jury trial and one of the prospective jurors been a long-time friend of a party or its counsel, done business with a party or its counsel, or employed counsel's daughter, or been a long time neighbor of a party, then that juror would have had an affirmative duty to disclose such facts which would be grounds for that juror's excuse for good cause. If the juror would have failed to disclose those extrajudicial facts, then the other party likely would have been denied a fair trial. Perhaps a greater standard and certainly no less standard should be applied where the trier of fact is a single person–the judge–than when the prospective juror is just one of a group.

The Supreme Court has held that the Constitution requires disclosure in other circumstances. In all of the cases, the "touchstone of due process analysis" is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Other cases requiring disclosure include *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959) (due process requires a state court prosecutor to disclose that false testimony, which goes to the credibility of a witness, and has gone into the record); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process requires the prosecutor to disclose a confession of a co-murderer); *Rogers v. United States*, 422 U.S. 35 (1975) (trial judge committed reversible error by unilaterally answering a jury's question in violation of Federal Rule Crim. Proc. 43); *United States v. Agurs*, 427 U.S. 97 (1976) (prosecutor must disclose unrequested evidence which would create a reasonable doubt of guilt that did not otherwise exist); *Rushen v. Spain*, 104 S.Ct. 453, 456 (1983) ("the trial judge generally should disclose" to counsel for all parties his ex parte communications with a juror) *Cf. Shields v. United States*, 273 U.S. 583, 588-589 (1927) (undisclosed instructions from judge to jury violates non-constitutionally based rules of orderly trial procedure);

In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that it was reversible error for the prose-

cutor to fail to disclose an alleged promise made to its key witness that the witness would not be prosecuted if he testified for the government. The Court held that the witness' credibility was "an important issue in the case," and that the jury was entitled to know of it. 92 S.Ct. at 766. The Court followed the rule that when the reliability of a witness may well be determinative of guilt or innocence, then the nondisclosure of evidence affecting credibility would be incompatible with rudimentary demands of justice. *Ibid.* Certainly due process, which requires the adversary to disclose facts relating to a witness' credibility, must also impose on state trial judges, who are to be neutral and non-adversarial, an affirmative duty to disclose extrajudicial facts which may be determinative as to how they will adjudge the credibility of the witnesses and weigh the evidence.

If an adversary such as the prosecutor must make disclosures, should not the trial judge, who is constitutionally mandated to be neutral, also be obligated to disclose extrajudicial facts which would lead a reasonable and prudent person to believe that the judge may be biased for or against one of the parties? The Supreme Court should grant this petition to answer this question.

If one objectively looks at the Record, it apparently made little difference to the Judge what Templetons did to reinstate the mortgage, or challenge what Arsenal claimed. The Court of Appeals of Indiana ruled that Templetons were not entitled to a new trial because they had not shown harm from the alleged bias or prejudice of the judge. The Supreme Court of Indiana let that decision stand. The harm is self-apparent, if the right to a fair trial in a fair tribunal by a neutral and impartial judge means anything. It would be very difficult, if not impossible, to prove the judge's thinking, if one cannot explore the judge's thought-process and especially if the judge refuses, as was the case here, to make voluntary disclosures or to give testimony at a deposition, or to let anyone else be questioned at a deposition. Can it be harmless error when a person is denied a fair trial in a fair

tribunal because of the bias and prejudice of the trial judge? The Supreme Court should grant this petition to answer this question.

In *Smith v. Phillips*, 102 S.Ct. 940, 947 (1982), the Supreme Court held that a party is entitled to a post-trial hearing to prove that a juror may have actually been biased. It reaffirmed the rule that an opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury. Should not a litigant have an equal right in a non-jury case? The Supreme Court should grant this petition to answer this question.

## CONCLUSION

This Petition for Certiorari presents three special and important questions of federal law which go to the heart of our system of justice. This Court has not decided them, but should now settle the questions, which the Court of Appeals of Indiana decided in a manner inconsistent with this Court's prior opinions and which the Supreme Court of Indiana declined to review. Therefore, the Writ of Certiorari should be issued.

Respectfully submitted,

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APPENDIX A

IN THE MARION SUPERIOR COURT
CIVIL DIVISION
ROOM NO. 6
Indianapolis, Indiana

| | | |
|---|---|---|
| ARSENAL SAVINGS ASSOCIATION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| VS. | ) | CAUSE NO. |
| | ) | S681-0188 |
| G. C. TEMPLETON, JR., | ) | |
| MARY PAT TEMPLETON, | ) | |
| SAM KLAIN & SONS, | ) | |
| SAM KLAIN, | ) | |
| ROBERT H. WEEDON, | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendants. | ) | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial by the Court on September 9, September 11, September 25, and October 19, 1981. Evidence was heard and the parties rested. On the basis of the evidence received and considering the arguments and briefs of counsel, the Court makes the following:

## FINDINGS OF FACT

1. The Plaintiff, Arsenal Savings Association, ("Arsenal") is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana.

2. On August 24, 1979, the Defendants, G. C. Templeton, Jr. and Mary Pat Templeton, (jointly and severally hereinafter "Templetons") for value received, executed and delivered to Arsenal their promissory note in the principal sum of One Hundred Fifty Thousand Dollars ($150,000.00) ("Note"). The Note provided that Arsenal would be entitled to collect all reasonable costs and expenses of suit including reasonable attorneys fees if suit was brought to collect the Note. Presentment, notice of dishonor and protest were waived by Templetons. The Note provided for interest on the unpaid principal balance from the date of its execution until paid at the rate of eleven percent (11.00%) per annum. Principal and interest in consecutive monthly installments of One Thousand Four Hundred Twenty-Eight and 50/100 Dollars ($1,428.50) were to be paid on the first day of each month beginning October 1, 1979 and continuing until the entire indebtedness evidenced by the Note was fully paid.

3. To secure the payment of the Note, the Defendant C. Templeton, Jr. ("Templeton") at all times relevant hereto being the owner of the fee simple title to:

> Lot Numbered 75 in Pickwick II, Third Section, an Addition to the City of Indianapolis, Indiana, as per plat thereof recorded September 28, 1972, as Instrument No. 7258381, in the Office of the Recorder of Marion County, Indiana, situated in Marion County, Indiana, commonly referred to as 8867 Alderly Court, Indianapolis, Indiana, ("Real Estate"),

on August 24, 1979, executed and delivered to Arsenal his mortgage ("Mortgage") on the Real Estate, mortgaging also the rents, issues and profits thereof to secure the payment of the Note. The Mortgage was recorded on August 27, 1979, as Instrument No. 79-64112 in the Office of the Recorder of Marion County, Indiana.

4. The Templetons paid the monthly installments of One Thousand Four Hundred Twenty-Eight and 50/100 Dollars

($1,428.50) required to be paid by the Note beginning on October 1, 1979 through the payment due on September 1, 1980, which paid interest through August 31, 1980. The September 1, 1980 payment was made on August 27, 1980. The Templetons did not make any other payments on the Note and Mortgage after August 27, 1980.

5. On December 31, 1980, after the Templetons failed to pay three (3) consecutive monthly installments on the Note, Arsenal mailed by certified mail return receipt requested to the Templetons to the address of the Real Estate the following letter:

"December 31, 1980

Gilbert C. Templeton, Jr.,
Mary Pat Templeton,
8867 Alderly Court,
Indianapolis, Indiana 46260
RE: Arsenal Account No. 82285-04

Dear Mr. & Mrs. Templeton:

You have breached the covenants and agreements contained in your note and mortgage on the above account by failing to pay the regular monthly payments. This account is presently delinquent $4,746.00. This is the amount necessary to cure the breach and bring your account current between now and December 31, 1980.

If payment is made on or after January 1, 1981, the January payment in the amount of $1,582.00 must be included in your remittance. The amount necessary to bring it current from January 1, 1981 to January 31, 1981, is $6,328.00.

If you fail to bring this account current on or before

January 31, 1981, the Association will declare all of the sums secured by the mortgage to be immediately due and payable without further demand and will file suit to foreclose the mortgage by judicial proceedings as a result of which there will be a sale of the property by the Sheriff if Judgment is rendered thereon.

You have the right to reinstate after acceleration and the right to assert in the foreclosure proceedings the non-existence of a default or any other defense you may have to acceleration and foreclosure.

Sincerely,

L. R. Beuoy, Loan Service Officer,
Loan Servicing Department,
(317) 263-0671
LRB/mjm" ("Notice")

6. Paragraph 18 of the Mortgage is as follows:
"18. Acceleration; Remedies. Except as provided in paragraph 17 hereof, upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by this Mortgage, Lender prior to acceleration shall mail notice to Borrower as provided in paragraph 14 hereof specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after

acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect in such pro-

ing all expenses of foreclosure, including, but not limited to, reasonable attorney's fees, and costs of documentary evidence, abstracts and title reports."

7. The Notice fully complied with all requirements of the Note and Mortgage, including paragraph #18 of the Mortgage. Paragraph #17 of the Mortgage has no applicability to the facts and circumstances of this case.

8. Templeton received the Notice. Templetons did not contact Arsenal and made no offer or tender to make any payments or to bring the account current. Because of the failure of Templetons to bring the accounts current, Arsenal exercised its option contained in the Note and Mortgage to declare all of the sums due under the Note and secured by the Mortgage to be immediately due and payable without further demand and proceeded to foreclose the Mortgage by judicial proceedings.

9. Arsenal, in order to protect its interest in the Real Estate, paid to the Treasurer of Marion County, Indiana, for real estate taxes on the Real Estate, the sum of One Hundred Fifty-two and 03/100 Dollars ($152.03) more than was in the escrow account.

10. The unpaid principal balance due from the Templetons to Arsenal on the Note is One Hundred Forty-Nine Thousand Three Hundred Twenty-Four and 62/100 Dollars ($149,324.62). Arsenal paid Chicago Title Insurance Company One Hundred Ten Dollars ($110.00) for a foreclosure title search on the Real

Estate.

11. Interest on the unpaid principal balance of the Note from September 1, 1980 through August 31, 1981 at the Note rate of eleven percent (11.00%) has accrued in the sum of Sixteen Thousand Four Hundred and 56/100 Dollars ($16,400.56). Interest in the amount of One Thousand Three Hundred Sixty-Eight and 81/100 ($1,368.81) has accrued for each of the months of September and October, 1981. The per diem interest charge is Forty-Five and 62/100 Dollars ($45.62).

12. A recapitulation of the sums due on the Note, exclusive of attorney fees, is as follows:

| | |
|---|---|
| Principal | $149,324.62 |
| Foreclosure title search | 110.00 |
| Negative escrow | 152.03 |
| Interest from Sept. 1, 1980 through August 31, 1981 | 16,400.56 |
| Interest for Sept. and Oct. 1981 at $1,368.81 per month | 2,737.62 |
| TOTAL | $168,724.83 |

The per diem interest charge is $45.62.

13. The Mortgage requires Templeton to pay the real estate taxes on the Real Estate by paying to Arsenal on the day monthly installments of principal and interest are payable under the Note a sum equal to one-twelfth (1/12) of the yearly real estate taxes. From the October 1, 1980 payment forward, this sum was One Hundred Fifty-Two and 03/100 Dollars ($152.03) which, together with the principal and interest payment of One Thousand Four Hundred Twenty-Eight and 50/100 Dollars ($1,428.50) required to be paid by the Note, made the total monthly payment One Thousand Five Hundred Eighty-Two Dollars ($1,582.00). Templeton failed to perform the covenants and agreements contained in the mortgage concerning the payment of the real estate taxes and the accrual in an escrow account of a sum equal to one-twelfth (1/12) of the yearly real estate taxes.

14. The monthly payments were in default and delinquent in the amount of Eighteen Thousand Nine Hundred Eighty-Four Dollars ($18,984.00) representing the twelve (12) payments from October 1, 1980 through September 1, 1981.

15. The Note provides that if suit is brought to collect the Note Arsenal shall be entitled to collect all reasonable costs and expenses of suit including reasonable attorneys fees.

16. Arsenal hired the law firm of Moores and Price to represent it in this action. Moores and Price is a law firm consisting of Merrill Moores ("Moores"), John L. Price ("Price"), Timothy L. Buckley as attorneys and Michael Harper, a senior law student, as paralegal.

17. Templeton is a competent businessman who likes to have his rights protected. He was represented by Chuck Wilson of Ice, Miller, Donadio and Ryan in a development project out of which the Sam Klain & Sons, Inc. Mechanic's Lien foreclosure arose and was represented by Charles Reeder of Johnson and Weaver in the Sam Klain case. Templeton is a person who does give up easily.

18. The Templetons hired Raymond F. Fairchild of Indianapolis, Indiana and Jerome J. Froelich, Jr. ("Froelich") of Atlanta, Georgia, as attorneys, and Attorney Jackie Kleiner ("Kleiner") of Atlanta, Georgia as an expert on "tender".

19. Templetons vigorously resisted and strenuously contested every aspect of this action. In order to represent Arsenal, Moores and Price prepared and filed many briefs in order to apprise the Court of facts and law presented by actions of the Templetons, including a Brief in Opposition to Templetons' Third Request for Extension of Time in Which to Answer the Complaint, a Brief in Opposition to Templetons' Motion for Leave of Court to File Affirmative Defenses and Counter-Claims, two Briefs in Opposition to separate motions by Templetons for Continuances, a Brief in Opposition to Templetons' Motion to Compel Discovery, to Dismiss the Action and for Attorney Fees, a Brief on the relevancy of evidence concerning judgment liens

occasioned by the vigorous objection of Templetons' attorney to its relevancy, a Brief in Opposition to Templetons' Motion for Summary Judgment and a Brief in Support of Arsenal's Application for the Appointment of a Receiver. Arsenal's attorneys were called upon to consider two separate motions for change of venue from the county and one motion for change of venue from the Judge. Arsenal's attorneys were called upon to prepare for and participate in oral arguments before the Court in opposition to Templetons' two separate motions for leave to amend their responsive pleadings, in support of Arsenal's Motion for Summary Judgment, Templetons' Motion to Dismiss, for Attorneys Fees and to Compel Discovery and Motion for Production and Arsenal's Petition for the Appointment of a Receiver. Arsenal's attorneys attended at least two separate depositions in connection with this action. The case itself took over two and one-half (2½) days of trial time, spread over four (4) days.

20. Moores and Price expended extensive time, including a great deal of legal research, to meet the complicated problems presented by the Templetons. This entailed a great number of conferences with a large number of Arsenal's personnel. A case of this complexity and difficulty requires highly skilled legal talent. Moores, the senior partner of Moores and Price, is in his twenty-ninth year of practice before the Bar, has been involved in a lot of court proceedings and has been Arsenal's general counsel for twenty-six years. Moores is a bright, skilled attorney. Both Moores and Price are experienced and qualified attorneys.

21. A fair and reasonable attorneys' fee for Moores and Price for their representation of Arsenal is $36,000.00.

22. Sam Klain & Sons, Inc. ("K ain") recovered a Judgment against Templeton for Twelve Thousand Two Hundred Seventy-One and 90/100 Dollars ($12,271.90) and costs on August 5, 1977 in the Superior Court of Marion County, Room No. 3 in Cause No. S375-622. Interest at the statutory rate of eight percent (8%) from the date of the rendition of the Judgment through October 22, 1981 is Four Thousand One Hundred

Thirty-Six and 35/100 Dollars ($4,136.35) with a per diem interest charge of Two and 69/100 Dollars ($2.69).

23. Klain recovered a Judgment against Templeton for Two Thousand Five Hundred Dollars ($2,500.00) and costs on March 3, 1978 in the Superior Court of Marion County, Room No. 3 in Cause # S375-622. Interest at the statutory rate of eight percent (8%) from the date of the rendition of the Judgment through October 22, 1981 is Seven Hundred Twenty-Six and 02/100 Dollars ($726.02) with a per diem interest charge of Fifty-Five Cents ($0.55).

24. The two Klain judgments were affirmed on appeal by an opinion of the Indiana Supreme Court rendered on August 31, 1981, in Cause # 881-S-222.

25. The G. C. Templeton, Jr. ("Templeton") who is the judgment debtor in the two Klain Judgments is one and the same person as the G. C. Templeton, Jr. ("Templeton") who is the owner of the Real Estate and one of the Defendants in this action. The two Klain Judgments are prime, prior and superior to the interest of Arsenal in the Real Estate by virtue of the Mortgage.

26. The United States of America ("USA") has a lien on the Real Estate against the Templetons by virtue of a Federal Tax Lien recorded August 14, 1980 as Instrument # 80-49229 in the Office of the Recorder of Marion County, Indiana, the unpaid balance of which as of September 9, 1981 was One Hundred Ninety-Nine Thousand Four Hundred Sixty Dollars ($199,460.00). A Failure to Pay Penalty accrues at the monthly rate of Seven Hundred Seventy-Seven and 95/100 Dollars ($777.95) for each month or a fraction of a month during which the amount remains unpaid after September 9, 1981 not to exceed a maximum of Thirty-Eight Thousand Six Hundred Sixty-Six and 14/100 Dollars ($38,666.14). Interest also accrues at the daily rate of Fifty-One and 11/100 Dollars ($51.11) after September 9, 1981 until the amount is paid.

27. The USA has a lien on the Real Estate against the Templetons by virtue of a Federal Tax Lien recorded July 16, 1981 as Instrument #81-44322 in the Office of the Recorder of Marion County, Indiana, the unpaid balance of which as of September 9, 1981 was Three Hundred Ninety-Seven and 58/100 Dollars ($397.58). Failure to Pay Penalty accrues at the monthly rate of of One and 69/100 Dollars ($1.69) for each month or a fraction of a month during which the amount remains unpaid after September 9, 1981 not to exceed a maximum of Eighty and 88/100 Dollars ($80.88). Interest also accrues at the daily rate of Twelve Cents ($0.12) after September 9, 1981 until the amount is paid.

28. The two USA liens are junior, inferior and subsequent to the two Klain judgments and lien of Arsenal's Mortgage.

29. The Federal Tax Lien for Six Thousand One Hundred Seventeen and 14/100 Dollars ($6,117.14) recorded December 18, 1980, as Instrument #80-81686 in the Office of the Recorder of Marion County, Indiana, against Templetons has been paid in full.

30. Paragraph #19 of the Mortgage is as follows:

"19. Borrower's Right to Reinstate. Notwithstanding Lender's acceleration of the sums secured by this Mortgage, Borrower shall have the right to have any proceedings begun by Lender to enforce this Mortgage discontinued at any time prior to entry of a judgment enforcing this Mortgage if: (a) Borrower pays Lender all sums which would be then due under this Mortgage, the Note and notes securing Future Advances, if any, had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Mortgage; (c) Borrower pays all reasonable expenses incurred by Lender in enforcing the covenants and agreements of Borrower contained in this Mortgage and in enforcing Lender's remedies as provided in paragraph 18 hereof, including,

but not limited to, reasonable attorney's fees; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Mortgage, Lender's interest in the Property and Borrower's obligation to pay the sums secured by this Mortgage shall continue unimpaired. Upon such payment and cure by Borrower, this Mortgage and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred."

31. On August 12, 1981, Templetons' attorney, Raymond F. Fairchild, delivered to Arsenal's attorney, Moores, the following letter:

"G. T. (sic) Templeton, Jr.
9908 Cedar Point Drive
Carmel, Indiana 46032

August 12, 1981

Richard D. Muir
Arsenal Savings Association
c/o Merrill Moores
Moores & Price
1720 Market Square Center
Indianapolis, Indiana 46204

Re: Borrower's Right To Reinstate Mortgage

Dear Mr. Muir:

Pursuant to paragraph 19 entitled "Borrower's Right To Reinstate," I am offering to bring all monthly payments current plus pay two months in advance. I am further offering to pay the above money on Tuesday, August 18, 1981.

If there are any other charges which need to be paid, please advise my attorney.

Very truly yours,
/s/ G.C. Templeton, Jr.
(Printed) Gil Templeton, Jr."

32. The Templetons did not tender to Arsenal any sums of money on Tuesday, August 18, 1981.

33. Templeton went to Atlanta, Georgia and hired Kleiner as an expert on "tender" to plan, prepare and attempt to execute a "tender" to Arsenal and paid him for his services, including testimony at the trial, the sum of Four Thousand Five Hundred Dollars ($4,500.00), including expenses. Kleinier taught at Fairleigh Dickinson University from 1959 to 1962. He taught at American University in Washington, D.C. and Fort Benning, Georgia from 1962 to 1965. He has been a Management Professor at Georgia Institute of Technology since 1964, teaching courses in the area of business law, taxation, investments and finance. Kleiner was a visiting professor at Miami-New York Law School from 1970 to 1980. Kleiner, in law school, taught courses in evidence, civil procedure, business planning, corporations, federal taxation, legal research and oral argument. Kleiner has a Bachelor's Degree in Business Administration with a major in Finance from the University of Georgia; a Master's Degree in Business Administration from New York University with a major in Finance; a Bachelor of Law's Degree from New York Law School; a Doctorate in Political Science from New York Law School and a Post-Doctoral Degree in Foreign Law from Columbia University. Kleiner is the author of several books which have been published, including: The Law of Business and Industry in 1969; Trial Handbook for Georgia Lawyers in 1974; Trial Handbook for Pennsylvania Lawyers in 1980; and Modern New York Discovery which will be published in the spring of 1982 by Lawyers Cooperative Publishing Company. Kleiner has practiced extensively in the field of real estate law, particularly

litigation, having represented the largest real estate firm in the City of Atlanta, Barton and Ludwig.

34. Templeton, his attorneys and "tender expert" Kleiner devised an alleged "tender" to Arsenal. The place, manner, means and form of the proposed "tender" were within the sole control of the Templetons, their attorneys and "tender expert" Kleiner.

35. In pursuit of the alleged "tender" the following letter was composed:

"August 21, 1981

G.C. Templeton, Jr.
9908 Cedar Point Drive
Carmel, Indiana 46032

Mr. Richard D. Muir
Chairman of the Board
Arsenal Savings Association
44 E. Washington St.
Indianapolis, Indiana 46204

Dear Mr. Muir:

I herewith tender to Arsenal Savings Association for acceptance as payment for immediate reinstatement of mortgage # 908285-17, the cash sum of $19,999.00 pursuant to Paragraph 19 of the Mortgage entitled "Borrowers Right to Reinstate." This $19,999.00 represents 12 monthly payments of $1,428.50 from September 1, 1980 through August 31, 1981 and 2 payments in advance, of $1,428.50 for September and October 1981.

If there are any other reasonable expenses which need to be paid, please advise my attorney, Raymond F.

Fairchild, 246 N. College Ave, Indianapolis, Indiana 46202 in writing on or before Noon August 24, 1981.

Sincerely,

/s/ G. C. Templeton, Jr.
G. C. Templeton, Jr. (Printed)" ("Letter")

36. On July 24, 1981, in order to oppose Arsenal's Motion for Summary Judgment, Templeton, under the penalties for perjury, filed an affidavit in this Court stating: "That the amount of the Note has been paid in full.", yet on August 21, 1981, Templeton took the Letter to Arsenal and presented it to Margaret Brown, the Secretary of Arsenal, and Richard D. Muir, the President and Chairman of the Board of Arsenal. Templeton did not take, display or present to either Margaret Brown or Richard D. Muir the Nineteen Thousand Nine Hundred Ninety-Nine Dollars ($19,999.00) referred to in the letter, or any other sum of money.

37. On August 21, 1981, Templetons' attorney, Froelich and "tender expert" Kleiner went to the offices of Moores & Price and, in the presence of Moores and Price, presented Moores with a copy of the Letter and displayed an amount of money, which "tender expert" Kleiner represented to be Twenty Thousand Dollars ($20,000.00). Neither Moores nor Price accepted this representation. This undetermined amount of money was not counted in the presence of either Moores or Price nor was it accepted by either Moores or Price. When Kleiner and Froelich left the offices of Moores & Price they took the money with them. The alleged "tender" was made pursuant to the Letter. Arsenal could not accept the money and apply it in any manner differently than that specified in the Letter.

38. The Templetons, their attorneys and "tender expert" Kleiner knew, or should have known, that the mortgage required the Templetons to pay to Arsenal on the day monthly installments of principal and interest were payable under the Note a

sum equal to one-twelfth (1/12) of the yearly real estate taxes. In August, 1980, this sum had been set at One Hundred Fifty-Three and 50/100 Dollars ($153.50) per month, which was to be added to the regular monthly payment of principal and interest. On August 21, 1981, this would have required the payment to Arsenal of One Thousand Six Hundred Eighty-Eight and 50/100 Dollars ($1,688.50). This sum was not included in the Letter nor did Templetons, their attornsy or "tender expert" Kleiner tender this sum to Arsenal, or Moores, or Price.

39. In order to effect a reinstatement, the Mortgage requires that Templeton pay all reasonable expenses incurred by Arsenal in enforcing the covenants and agreements of Templeton contained in the Mortgage and in the foreclosing of the Mortgage, including reasonable attorneys fees. Templeton, his attorneys and "tender expert" Kleiner knew or should have known, that Arsenal had expended Thirty-Two Dollars ($32.00) in the required filing fee and One Hundred Ten Dollars ($110.00) for the foreclosure search by the title insurance company which is recited in the Complaint. Neither Templeton, nor his attorneys, nor "tender expert" Kleiner, tendered to Arsenal, or Moores, or Price, these sums.

40. Neither the Templetons nor Froelich nor "tender expert" Kleiner ever tendered to Arsenal or Moores or Price: 1) the sums due under the Note and Mortgage had no acceleration occurred; 2) the One Thousand Six Hundred Eighty-Eight and 50/100 Dollars ($1,688.50) representing the eleven delinquent monthly payments of one-twelfth (1/12) of the yearly real estate taxes; or 3) the known reasonable expenses incurred by Arsenal in enforcing Templeton's covenants and agreements contained in the Mortgage and enforcing Arsenal's remedies as provided in paragraph #18 thereof consisting of the Thirty-Two Dollars ($32.00) filing fee and the One Hundred Ten Dollars ($110.00) foreclosure search charge.

41. Under the terms of the Mortgage, the Templetons were entitled at any time up to the rendition of this judgment to

ascertain all of the reasonable expenses of Arsenal, including attorneys fees, required to be paid in order to reinstate the mortgage pursuant to its terms, including an application to this Court for the setting and allowance of such reasonable expenses. This was never done.

42. After the abortive "tender" of August 21, 1981, Templetons, through their attorneys, in open Court during the trial of this case, made oral representations of a desire to effect a "tender of Twenty Thousand Dollars ($20,000.00)" to secure the reinstatement of the Mortgage. At no time during these oral representations of a desire to "tender Twenty Thousand Dollars ($20,000.00)" to secure the reinstatement of the Mortgage did the Templetons, their attorneys or "tender expert" Kleiner present or display any sums of money, until Templeton was testifying in the case at which time he displayed what appeared to be un undetermined amount of currency, which Templeton asserted was Twenty Thousand Eight Hundred Sixty and 03/100 Dollars ($20,860.03). If the alleged "tender" of the alleged Twenty Thousand Eight Hundred Sixty and 03/100 Dollars ($20,860.03) (both facts unproven), had been made it would not have been sufficient to pay all sums which would have been then due under the Note and Mortgage had no acceleration occurred and all reasonable expenses incurred by Arsenal in enforcing the covenants and agreements of Templeton contained in the Mortgage in enforcing Arsenal's remedies as provided in paragraph #18 thereof, including but not limited to reasonable attorney's fees, particularly in view of the fact that prior thereto in the trial there had been uncontradicted evidence of attorney fees expense to enforce the Note and Mortgage incurred by Arsenal in an amount substantially in excess of the total amount allegedly "tendered". No application was made to the Court to establish, set and allow Arsenal's reasonable expenses including attorney's fees, and no representation was made by Templeton, his attorneys or "tender expert" Kleiner that either Templetons or anyone on their behalf had any desire, willingness or ability to pay such reasonable

expenses as the Court might set. At no time were any sums paid into the Clerk's Office of this Court under this cause number representing a tender to be distributed pursuant to the order of this Court.

43. Arsenal's Data Processing System automatically produces past due notices every month on each of its mortgage loans. Personnel in Arsenal's mortgage servicing department manually remove the past due notices on accounts where Arsenal has exercised its option to accelerate the balance due and suit is pending to foreclose the mortgage, and these past due notices are not mailed. By mistake, the August, 1981, past due notice on the Templetons' account was not removed and was sent to and received by the Templetons. The sending of this past due notice did not constitute a waiver by Arsenal of its exercise of its option to declare all of the sums due under the Note and Mortgage to be immediately due and payable. Templetons did not tender to Arsenal any sums of money as a result of the receipt of the past due notice.

44. Robert H. Weedon, ("Weedon") was made a party to this action by virtue of a judgment he recovered against G. C. Templeton, Jr. for One Thousand Five Hundred Dollars ($1,500.00) and costs on January 14, 1981, in the Marion Circuit Court in Cause No. C80-799. Weedon was duly notified of the filing and pendency of this action by a Summons duly served by certified mail, the return receipt for which was signed by Weedon on February 18, 1981. Weedon has never appeared in this action in person or by counsel and has made no defense, but has made default.

45. The Court now finds for Arsenal on its Complaint and against the Templetons on their Counter-Claim.

On the basis of the foregoing facts, the Court now makes the following:

## CONCLUSIONS OF LAW

A. The law is with Arsenal and against the Templetons. The Templetons shall take nothing by their Counter-Claim.

B. The Templetons breached covenants and agreements in the Note and Mortgage by failing and refusing to make regular monthly payments of principal and interest in the amount of One Thousand Four Hundred Twenty-Eight and 50/100 Dollars ($1,428.50) beginning with the payment due October 1, 1980, and continuing to the date of the rendition of this Judgment.

C. Templeton breached covenants and agreements in the Note and Mortgage by failing and refusing to make regular monthly payments of a sum equal to one-twelfth (1/12) of the yearly real estate taxes on the Real Estate beginning with the payment due October 1, 1980, and continuing to the date of the rendition of this Judgment.

D. Arsenal performed all conditions precedent to their right to declare an acceleration of all the sums due under the Note and secured by the Mortgage to be immediately due and payable and to commence suit to foreclose the Mortgage by judicial proceeding.

E. Neither the Templetons, nor Froelich, nor "tender expert" Kleiner made any tender to reinstate the Mortgage pursuant to the provisions of the Mortgage or of the general rules of equity.

F. The Templetons have failed to perform the conditions, covenants and stipulations of the Note and Mortgage and have continued said default to this date.

G. Klain by virtue of their recovery of a Judgment against Templeton on August 5, 1977 in Cause No. S375-622 has a first lien on the Real Estate in the amount of Twelve Thousand Two Hundred Seventy-One and 90/100 Dollars ($12,271.90) plus court costs together with interest at eight percent (8%) per annum from August 5, 1977 through October 22, 1981 in the amount of Four Thousand One Hundred Thirty-Six and 35/100

Dollars ($4,136.35) together with a per diem interest charge thereafter in the amount of Two and 69/100 Dollars ($2.69) to the date of the rendition of this judgment and thereafter to any Sheriff's sale that may be conducted pursuant to this Decree.

H. Klain by virtue of their recovery of a Judgment against Templeton on March 3, 1978 in Cause No. S375-622 has a second lien on the Real Estate in the amount of Two Thousand Five Hundred Dollars ($2,500.00) plus court costs together with interest at eight percent (8%) per annum from March 3, 1978 through October 22, 1981 in the amount of Seven Hundred Twenty-Six and 02/100 Dollars ($726.02) together with a per diem interest charge thereafter in the amount of Fifty-Five Cents ($0.55) to the date of the rendition of this judgment and thereafter to any Sheriff's sale that may be conducted pursuant to this Decree.

I. Arsenal is vested with all right, title and interest in and to the Note and Mortgage and is entitled to all remedies and relief at law and in equity thereunder and Arsenal shall recover of and from the Templetons, jointly and severally, without any relief from valuation or appraisement laws, the aggregate sum of One Hundred Sixty-Eight Thousand Seven Hundred Twenty-Four and 83/100 Dollars ($168,724.83) as of October 22, 1981 together with a per diem interest charge of Forty-Five and 62/100 Dollars ($45.62) until the date of the rendition of this Judgment, together with the reasonable attorneys fees for their attorneys, Moores and Price, in the amount of $36,000.00, making a total of $204,724.83 on the Note and Mortgage and all accruing costs of this action.

J. USA's interest in the Real Estate by virtue of the Federal Tax Lien recorded August 14, 1980 as Instrument # 80-49229 in the Office of the Recorder of Marion County, Indiana against the Templetons is a lien on the Real Estate, but is junior, inferior and subsequent to the lien of Klain and the Judgment of Arsenal.

K. USA's interest in the Real Estate by virtue of the Federal Tax Lien recorded July 16, 1981 as Instrument #81-44322 in the Office of the Recorder of Marion County, Indiana against the Templetons is a lien on the Real Estate, but is junior, inferior and subsequent to the liens of Klain and the Judgment of Arsenal.

L. Weedon is defaulted and has no right, title or interest in, or to, the Real Estate.

M. The mortgage is hereby foreclosed and the equity of redemption of Templeton and that of all persons, firms or corporations claiming of, from, under or through him in and to the Real Estate described in the Complaint, same being and lying in the County of Marion, State of Indiana, and described as follows, to-wit:

> Lot Numbered 75 in Pickwick II, Third Section, an Addition to the City of Indianapolis, Indiana, as per plat thereof recorded September 28, 1972, as Instrument #72-58381, in the Office of the Recorder of Marion County, Indiana.

be, and the same is hereby barred and foreclosed, and that the said Real Estate and all of the right, title and interest of Templeton and of all persons, firms or corporations claiming of, from, under or through him, in or to the Real Estate shall be sold by the Sheriff of Marion County as other lands are sold on execution, the sale to be made without any relief from valuation or appraisement laws and to be free an clear of all liens except taxes and assessments legally levied and assessed thereon. The proceeds arising from said sale shall be applied as follows:

1. To the payment of costs and accruing costs herein.

2. To the payment of the amount found due Sam Klain & Sons, Inc. ("Klain") on the Judgment for Twelve Thousand Two Hundred Seventy-One and 90/100 Dollars ($12,271.90) plus costs, together with interest at Eight percent (8%) per annum from August 5, 1977 through October 22, 1981 in the amount of Four Thousand One Hundred Thirty-Six and 35/100 Dollars

($4,136.35) together with a per diem interest charge thereafter in the amount of Two and 69/100 Dollars ($2.69) to the date of the rendition of this Judgment by virtue of a Judgment against Templeton on August 5, 1977 in Cause # S375-622, and thereafter to the date of the Sheriff's sale.

3. To the payment of the amount found due Sam Klain & Sons, Inc. ("Klain") on the Judgment for Two Thousand Five Hundred Dollars ($2,500.00) plus costs together with interest at Eight percent (8%) per annum from March 3, 1978 to October 22, 1981 in the amount of Seven Hundred Twenty-Six and 02/100 ($726.02) together with a per diem interest charge thereafter in the amount of Fifty-Five Cents ($0.55) to the date of the rendition of this Judgment by virtue of a Judgment against Templeton on March 3, 1978 in Cause # S375-622, and thereafter to the date of the Sheriff's sale.

4. To the payment of the amount found due Arsenal on the claim sued on herein, being the amount of the Judgment hereinbefore rendered, to-wit: the aggregate sum of One Hundred Sixty-Eight Thousand Seven Hundred Twenty-Four and 83/100 Dollars ($168,724.83) as of October 22, 1981 together with a per diem interest charge of Forty-Five and 62/100 Dollars ($45.62) until the date of the rendition of this Judgment, together with the reasonable attorneys fees for their attorneys, Moores and Price, in the amount of $36,000.00, making a total of $$204,724.83.

5. The overplus, if any, shall be paid by the Sheriff of Marion County to the Clerk of the Marion County under this cause number to be distributed to the USA upon proper application and proof of the sums due on its Federal Tax Liens, and the balance to be distributed to the persons legally determined to be entitled thereto by this Court.

N. In the event the real estate shall fail to sell for a sufficient sum to pay and satisfy the two Klain Judgments and Arsenal's Judgment, interest, costs and accruing costs, the residue thereof remaining unpaid shall be levied on the goods and

chattels, lands and tenements of the Templetons subject to execution, and the sale thereof shall be made without any relief from valuation or appraisement laws.

O. Upon the expiration of any statutory period of redemption and the execution by the Sheriff of a deed of conveyance for the Real Estate so sold and not redeemed to the person or persons, firm or corporation entitled thereto, the the Templetons and anyone claiming under, or through, them in possession of the Real Estate, or any part thereof, shall, upon demand and exhibition of the deed or a facsimile thereof, forthwith surrender to the holder of such deed the full and peaceable possession of said Real Estate.

P. At the sale on foreclosure and at the sale on execution, Klain and Arsenal shall have the right to bid for the property offered for sale, and in the event either Klain or Arsenal is the successful bidder, it shall have the right to apply the amount of its Judgment or Judgments, including all interest thereon as may be required, as a credit toward the purchase price of such property; provided, however, that if Arsenal is the successful bidder it must first tender to the Sheriff at the sale the amount due Klain under its two Judgments.

Q. A certified copy of this Decree under hand and seal of the Clerk of this Court shall be full and sufficient authority of the Sheriff to execute the same.

ALL OF WHICH IS ORDERED this__ day of Nov 16 1981, 19__, in Indianapolis, Marion County, Indiana.

/s/ Edward Madinger
JUDGE, MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 6

FILED
NOV. 16, 1981

APPENDIX B

IN THE MARION SUPERIOR COURT
CIVIL DIVISION
ROOM NO. 6
Indianapolis, Indiana

| | | |
|---|---|---|
| ARSENAL SAVINGS ASSOCIATION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| VS. | ) | CAUSE NO. |
| | ) | S681-0188 |
| G. C. TEMPLETON, JR., | ) | |
| MARY PAT TEMPLETON, | ) | |
| SAM KLAIN & SONS, | ) | |
| SAM KLAIN, | ) | |
| ROBERT H. WEEDON, | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendants. | ) | |

COMES NOW the Plaintiff, Arsenal Savings Association, by its attorney, Merrill Moores, and COME NOW the Defendants, G.C. Templeton, Jr. and Mary Pat Templeton ("Templetons"), by their attorney, Jon R. Pactor, and the Court, having heard argument on Templetons' Motion to Correct Errors filed January 18, 1982, directed at the Findings of Fact and Conclusions of Law entered by the Court on November 16, 1981, and having considered the Briefs submitted by the attorneys, now makes the following corrections in its Findings of Fact and Conclusions of Law:

ORDER ON MOTION
TO CORRECT ERRORS

The figure "$36,000.00" contained in Finding No. 21 shall be amended to read "$25,000.00".

The figure "$36,000.00" contained in Conclusion of Law "I" shall be changed to read "$25,000.00" and the total amount of the Judgment contained in Conclusion of Law "I" shall be changed from "$204,724.83" to "$193,724.83".

The figure "$36,000.00" contained in Conclusion of Law "M(4)" shall be changed to read "$25,000.00" and the total amount of the Judgment contained in Conclusion of Law "M(4)" shall be changed from "$204,724.83" to "$193,724.83".

The Court sustains specification 11 of Templetons' Motion to Correct Errors and hereby sets aside and holds for naught its appointment of a receiver, with the proviso that the Templetons deposit with the Court within 5 days of the entry of this order a fire and extended coverage insurance policy in the amount of $250,000.00 on the real estate herein involved, being 8867 Alderly Court, Indianapolis, Indiana, which policy should contain a 10 day notice of cancellation to the Court. This policy is to be maintained and the Templetons are to pay the premiums therefor until this action is fully and finally resolved by the conduct of a sheriff's sale pursuant to the judgment of this Court.

In all other respects the Templetons' Motion to Correct Error is overruled and the Findings of Fact and Conclusions of Law entered by the Court on November 16, 1981 as herein amended are reaffirmed and confirmed.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court the Findings of Fact and Conclusions of Law are amended as follows:

1. The figure "$36,000.00" contained in Finding No. 21 is hereby amended to read "$25,000.00".

2. The figure "$36,000.00" contained in Conclusion of Law "I" is hereby amended to read "$25,000.00" and the total amount of the Judgment contained in Conclusion of Law "I" is hereby amended from "$204,724.83" to "$193,724.83".

3. The figure "$36,000.00" contained in Conclusion of

Law "M(4)" is hereby amended to read "$25,000.00" and the total amount of the Judgment contained in Conclusion of Law "M(4)" is hereby amended from "$204,724.83" to "$193,724.83".

4. The Court sustains specification 11 of Templetons' Motion to Correct Errors and hereby sets aside and holds for naught its appointment of a receiver, with the proviso that the Templetons deposit with the Court within 5 days of the entry of this order a fire and extended coverage insurance policy in the amount of $250,000.00 on the real estate herein involved, being 8867 Alderly Court, Indianapolis, Indiana, which policy should contain a 10 day notice of cancellation to the Court. This policy is to be maintained and the Templetons are to pay the premiums therefor until this action is fully and finally resolved by the conduct of a sheriff's sale pursuant to the judgment of this Court.

5. In all other respects the Court overrules Templetons' Motion to Correct Errors.

6. In all other respects, the Court's Findings of Fact and Conclusions of Law entered on November 16, 1981 are hereby reaffirmed and confirmed.

The Sheriff of Marion County, Indiana is hereby ordered to conduct the Sheriff's sale pursuant to the Judgment rendered in this cause in accordance with the changes effected by this Order.

ALL OF WHICH IS ORDERED this 9th day of March, 1982 in Indianapolis, Marion County, Indiana.

/s/ Edward Madinger
JUDGE, MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. 6

FILED
MAR. 9, 1983

APPENDIX C

ATTORNEY FOR APPELLANTS:
JON R. PACTOR
Suite 205
Old Trails Building
309 W. Washington Street
Indianapolis, Indiana 46204

ATTORNEY FOR APPELLEE:
MERRILL MOORES
1720 Market Square Center
151 North Delaware Street
Indianapolis, Indiana 46204

IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT

| | |
|---|---|
| G. C. TEMPLETON, JR. and MARY PAT TEMPLETON,<br><br>Appellants (Defendants and Cross-claimants Below),<br><br>v.<br><br>ARSENAL SAVINGS ASSOCIATION,<br><br>Appellee (Plaintiff and Cross-defendant Below),<br><br>and<br><br>UNITED STATES OF AMERICA, SAM KLAIN & SONS, SAM KLAIN, and ROBERT H. WEEDON,<br><br>Appellees (Defendants Below) | No. 2-682-A-155 |

APPEAL FROM THE MARION SUPERIOR COURT
CIVIL DIVISION ROOM 6
The Honorable Edward Madinger, Judge
Cause No. S681-0188)

BUCHANAN, C.J.

MEMORANDUM DECISION

Defendants-appellants-cross-claimants G. C. Templeton, Jr. and Mary Pat Templeton (the Templetons) appeal from the trial court's judgment granting foreclosure of their mortgage with Arsenal Savings Association (Arsenal) and denying their counterclaim for reinstatement of the mortgage, claiming that Arsenal is not entitled to foreclosure due to contractual violations and inequitable acts, that a valid tender was made, that the trial court erred in denying motions for change of venue, for leave to amend their answer, for change of judge, and for aid in discovery, and that the trial court erred in excluding evidence, in awarding excessive attorney fees to Arsenal, and in refusing to award attorney fees to the Templetons.

We affirm, and remand for further proceedings consistent with this opinion.

The facts most favorable to the judgment indicate that on August 24, 1979, the Templetons borrowed $150,000.00 from Arsenal as evidenced by a note and secured by a mortgage on their Marion County residence. Monthly payments were made in accordance with the note and mortgage until October 1, 1980. Arsenal sent the Templetons a letter on December 31, 1980, informing them that unless their delinquent payments were made within thirty days the mortgage would be foreclosed.

After receiving no response from the Templetons, Arsenal filed suit to foreclose the mortgage on February 17, 1981. The Templetons then sought to reinstate the mortgage by means of a letter dated Autust 12, 1981, addressed to the president of Arsenal, offering to bring all monthly payments current and to pay two months in advance. Pursuant to this letter, the Templetons and their attorneys personally offered cash to Arsenal's president and attorneys on August 21, 1981. Both payments were refused, as were later offers of cash at trial.

Findings of fact and conclusions of law were entered by the trial court in favor of Arsenal. Specifically, the trial court found the Templetons in default, allowed foreclosure of the mortgage, and denied the Templeton's counterclaim (added as an amendment to their answer) for reinstatement of the mortgage because no valid tender was made.

The Templetons present multiple issues on appeal:

1. Did Arsenal send a proper notice of default as required by the mortgage?
2. Did Arsenal wrongfully reject lawful tenders offered by the Templetons to reinstate the mortgage?
3. Did Arsenal act in good faith and with clean hands in order to obtain equitable relief?
4. Did the trial court err in denying a change of venue?
5. Did the trial court err in denying the Templeton's request for leave to amend their answer by adding counterclaims?
6. Did the trial court err in denying a change of judge based on allegations of bias?
7. Did the trial court err in denying motions for aid of discovery?
8. Did the trial court err in excluding evidence of a prior loan?
9. Did the trial court award excessive attorney fees to Arsenal?
10. Did the trial court err in refusing to award attorney fees to the Templetons?

## I.

Arsenal sent a proper notice of default as required by the mortgage. The mortgage contained the following relevant provisions:

> "18. [U]pon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by the Mortgage, Lender prior to acceleration shall mail notice to Borrower as provided in paragraph 14 hereof specifying (1) the breach; (2) the action required to cure such breach; (2) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure
> . . . .
>
> "14. [A]ny notice to Borrower provided for in this Mortgage shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein."

Record at 904 (emphasis supplied).

On December 31, 1980, Arsenal sent a letter to the Templetons by certified mail which read as follows:

> "You have breached the covenants and agreements contained in your note and mortgage on the above account by failing to pay the regular monthly payments. This account is presently delinquent $4,746.00. This is the amount necessary to cure the breach and bring your account current between now and December 31, 1980.

> If payment is made on or after January 1, 1981, the January payment in the amount of $1,582.00 must be included in your remittance. The amount necessary to bring it current from January 1, 1981 to January 31, 1981, is $6,328.00.
>
> If you fail to bring this account current on or before January 31, 1981, the Association will declare all of the sums secured by the mortgage to be immediately due and payable without further demand and will file suit to foreclose the mortgage by judicial proceedings as a result of which there will be a sale of the property by the Sheriff if judgment is rendered thereon.
>
> You have the right to reinstate after acceleration and the right to assert in the foreclosure proceedings the non-existence of a default or any other defense you may have to acceleration and foreclosure."

Record at 906 (emphasis supplied).

The Templetons contend that this letter is a "delinquency" notice rather than a "default" notice, concluding that Arsenal never properly declared their account to be in "default" as required by the mortgage before foreclosure proceedings may be instituted. We see no merit in this distinction because the letter explicitly follows the prerequisites outlined in the mortgage for declaring an account in default and foreclosing on the mortgage. See Streets v. M.G.I.C. Mortgage Corp., (1978) Ind.App., 378 N.E.2d 915, trans. denied.

II.

Arsenal did not wrongfully reject a valid tender offered by the Templetons to reinstate the mortgage. The first step to proving a valid tender is a showing that a tender was made of the full amount due. Moore v. Anchor Federal Savings and Loan Assn., (1968) 142 Ind.App. 681, 237 N.E.2d 114. The mortgage

delineated the following procedure available to a borrower for reinstatement of the mortgage after acceleration proceedings have begun:

> "19. Borrower's Right to Reinstate. Notwithstanding Lender's acceleration of the sums secured by this Mortgage, Borrower shall have the right to have any proceedings begun by Lender to enforce this Mortgage discontinued at any time prior to entry of a judgment enforcing the Mortgage if: (a) Borrower pays Lender all sums which would be then due under this Mortgage, the Note and notes securing Future Advances, if any, had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Mortgage; (c) Borrower pays all reasonable expenses incurred by Lender in enforcing the covenants and agreements of Borrower contained in this Mortgage and in enforcing Lender's remedies as provided in paragraph 18 hereof, including, but not limited to, reasonable attorney's fees; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Mortgage, Lender's interest in the Property and Borrower's obligation to pay the sums secured by this Mortgage shall continue unimpaired. Upon such payment and cure by Borrower, this Mortgage and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred."

Record at 904 (emphasis supplied).

The Templetons claim that they "tendered" an amount of cash which they believed in good faith to be the amount required for reinstatement of their mortgage. In order to effectuate a valid "tender", the Templetons mailed this letter to Arsenal's president on August 12, 1981:

> "Pursuant to paragraph 19 entitled 'Borrower's Right To Reinstate,' I am offering to bring all monthly pay-

> ments current plus pay two months in advance. I am further offering to pay the above money on Tuesday, August 18, 1981.
>
> If there are any other charges which need to be paid, please advise my attorney."

Record at 926 (emphasis supplied). Then, on August 21, 1981, the Templetons and their attorneys presented Arsenal's president and attorneys with cash accompanied by this letter (this letter describes the complete tender – no oral representations were made):

> "I herewith tender to Arsenal Savings Association for acceptance as payment for immediate reinstatement of mortgage No. 908285-17, the cash sum of $19,999.00 pursuant to Paragraph 19 of the Mortgage entitled "Borrowers Right to Reinstate." This $19,999.00 represents 12 monthly payments of $1,428.50 from September 1, 1980 through August 31, 1981 and 2 payments, in advance, of $1,428.50 for September and October 1981.
>
> If there are any other reasonable expenses which need to be paid, please advise my attorney, Raymond F. Fairchild, 246 N. College Ave, Indianapolis, Indiana 46202 in writing on or before Noon August 24, 1981."

Record at 942 (emphasis supplied). At trial, the Templetons offered sums of cash for reinstatement of the mortgage varying from $18,984.00 to $21,000.00, record at 491, 761, and on many occasions the Templetons reminded the court of their ongoing "tender" offer. All of these cash offers were rejected by Arsenal's agents.

We agree with the conclusion of the trial court that the Templetons never made a valid "tender" for reinstatement because none of the tender offers came close to the amount actually required for reinstatement under the contract. From the face of the mortgage and complaint, the Templetons were clearly advised of the items due for reinstatement. Record at 1-11.

These included not just monthly payments of principle and interest, but also real estate taxes, interest on amounts owed, and expenses for bringing the foreclosure suit including filing fees, title search fees, and attorney fees. See Findings of Fact and Conclusions of Law, record at 281; Mortgage, record at 904; Complaint, record at 2. None of the Templeton's "tender" offers included any of these items.

We do not agree with the Templetons that the failure of Arsenal to respond to their letters of "tender" and presentations of cash by outlining the additional charges results in the amount owing being unknown or disputed. The amounts due were clearly ascertainable in this case from the face of the mortgage and the complaint. The Templetons only disputed the amount of attorney fees at trial, but never included any such amount in their "tender" as attorney fees. When the amounts required for reinstatement are easily ascertainable and the borrower does not dispute any of the amounts at the time of "tender," we fail to understand how the amount owed could be labeled "uncertain or disputed." Cf. Kraus v. Montgomery, (1888) 114 Ind. 103, 16 N.E. 153, 155 ("where the amount due is uncertain, or depends upon different and doubtful constructions of law, it is only necessary that the party in default shall tender and bring into court the amount admitted, or which he in good faith believes to be due").

Finally, the Templetons assert that Arsenal waived any right to fees above and beyond the monthly principal and interest payments by mailing a delinquency notice on August 17, 1981, which asked for $17,402.00 as the "total due". Record at 943. We agree with the trial court that this notice was accidentally mailed well into the foreclosure proceedings and could not be interpreted as a waiver of any kind. See Findings of Fact and Conclusions of Law, record at 294. Having failed to meet their initial burden of proving that a tender was made of the total

amount due, we find no valid tender for reinstatement ever occurred.1/

III.

Arsenal acted in good faith and with clean hands in order to obtain equitable relief. The Templetons allege that Arsenal acted in bad faith and with unclean hands by "wrongfully" rejecting the Templeton's tender, resulting in unnecessarily protracted litigation, and by failing to reveal bias on the part of the trial judge. Due to our resolution of Issues II and VI, we find these allegations to be without merit. Arsenal has not engaged in inequitable conduct which would prevent a court of equity from granting it relief. See Streets, supra.

IV.

The trial court did not err in denying a change of venue. Ind. Rules of Procedure, Trial Rule 76(2) provides that "any such application for a change of judge or change of venue shall be filed not later than ten (10) days after the issues are first closed on the merits." When there are multiple defendants, the issues are "first closed on the merits" with the filing of the first answer on the merits. Rayburn v. Eisen, (1975) 166 Ind.App. 329, 336 N.E.2d 392, trans. denied.

Here, the Templeton's co-defendant, the United States of America (the USA), filed its answer on March 27, 1981. Record at 29. The Templetons filed their answer on May 20, 1981, and one day later they filed a motion for change of venue. Record at 46-48. This motion was denied as not being timely filed.

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1. Because of our disposition of this issue, we need not address the necessity of tendering the money to court upon Arsenal's rejection of the tender.

Record at 49. The trial court was correct in this action because the motion for change of venue was not filed until almost two months after the issues were first closed on the merits by the filing of the USA's answer.

The Templetons urge us to treat them as second generation defendants, who are allowed an automatic change of venue outside the ten (10) day rule, because the USA failed to serve its answer on them and so they were not aware that the issues had been closed on the merits. Any error in service of the USA's answer has been waived by the Templetons for failure to bring the matter to the attention of the trial judge until after judgment was rendered. See Enderle v. Sharman, (1981) Ind.App., 422 N.E.2d 686. Moreover, the issues are first closed on the merits when the first defendant's answer is filed rather than served. See Rayburn, supra.

V.

The trial court did not err in denying the Templetons's request for leave to amend their answer by adding counterclaims challenging the validity of a prior loan. In two sections of their brief, the Templetons allege that the trial court abused its discretion in denying their motion to amend their answer (a later motion to amend was granted on the issue of tender). On neither occasion are the allegations supported by any citation to authority. Thus, any error is waived. Ind. Rules of Procedure, Appellate Rule 8.3(A)(7); Wireman v. State, (1982) Ind., 432 N.E.2d 1343.

VI.

The trial court did not err in denying a change of judge based on allegations of bias and prejudice. A motion for change of judge was filed with the motion to correct error by the

Templetons. Record at 384. Denial of this motion, as well as a general claim of denial of due process based on judicial bias and prejudice, are raised as errors for our review.

In order to be granted a change of judge for cause pursuant to Ind. Code 34-1-13-1 (1982), the Templetons must first meet the prerequisites of T.R. 76(8):2/

> "Provided, however, if the moving party first obtains knowledge of the grounds for change of venue from the county or judge after the time above limited, he may file said application, which must be verified personally by the party himself, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten [10] days, and the ruling of the court may be reviewed only for abuse of discretion."

(Emphasis supplied). The affidavit which accompanies the motion for change of judge consists of many factual allegations introduced by this statement:

> "Since the trial, I have personally uncovered information causing me to feel that neither my wife nor I received a fair trial. Some of that information follows."

Record at 384 (emphasis supplied). This statement does not attempt to identify why the factual allegations could not have been discovered earlier in the course of due diligence. See City of Indianapolis v. L & G Realty and Construction Co., (1960) 132 Ind.App. 17, 170 N.E.2d 908 (use of term "recently" inadequate to satisfy requirement that affidavit and motion were

---

2. The Templetons's motion for change of judge was filed well beyond the time period in which such a motion must be granted. T.R. 76(2).

filed at earliest opportunity). The allegations center on judicial conduct and rulings throughout the trial as well as the judge's past association with Arsenal's attorney, all of which could have been known to the Templetons prior to the filing of their motion for change of judge with their motion to correct error. Therefore, the trial judge properly denied the motion.

As for the Templetons's vigorous contention that they were denied due process of law by the judge's bias and prejudice, we need not address each action cited by the Templetons because "[i]t is axiomatic that for alleged prejudice and hostility to be reversible, some harm must be shown." Campbell v. Eli Lilly & Co., (1980) Ind.App., 413 N.E.2d 1054, 1059, trans. denied. No such harm has been shown.

## VII.

The trial court did not err in denying motions for aid of discovery. Motions to compel discovery, to produce, and to be allowed a continuance in order to conduct further discovery were all denied. Record at 96, 105, 130, 163, 179, 181. Ind. Rules of Procedure, Marion County Circuit and Superior Court Rule 9, is the core of the Templetons's argument:3/

> "In all cases discovery shall be completed within six (6) months after the case is at issue unless otherwise ordered by the Court."

The Templetons interpret this rule as requiring the trial court to grant all discovery motions filed within six months of when the case is "at issue." the intention of the rule is clearly to curtail unnecessary delay in discovery procedures rather than to require that all discovery motions be granted within a specified time period.

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3. The Templetons's brief incorrectly cites "Local Rule 10" but we were able to ascertain from the text which rule they intended to discuss. Appellant's brief at 107.

It is a well-known tenet of discovery law that all motions to compel discovery are granted or denied as the trial court determines within its discretion. We review such actions only for an abuse of discretion. Chustak v. Northern Indiana Public Service Co., (1972) 259 Ind. 390, 288 N.E.2d 149; J.Y. v. D.A., (1978) Ind.App., 381 N.E.2d 1270. Each of the Templetons's motions was aimed at discovery of information pertaining to the counterclaims which the Templetons desired to add to their answer relating to a prior loan. The trial court denied the motion to amend the answer with counterclaims relating to the prior loan, and we will not review the action because any error has been waived. See Issue V. Consequently, the motions in aid of discovery were denied because they entered areas irrelevant to the cause of action. We find no abuse of discretion based on these facts.

VIII.

The trial court did not err in excluding evidence of the prior loan. Errors raised pertaining to discovery, amendment of the answer, and exclusion of evidence at trial all focus on a prior loan with Arsenal which was transformed into the present note and mortgage. In addressing the exclusion of proffered evidence concerning the prior loan, we find that the Templetons have waived any error by failure to cite any authority. Appellant's brief at 77, 107; A.R. 8.3(A)(7); Wireman, supra.

IX.

The trial court did not award excessive attorney fees to Arsenal. A zealous claim is made by the Templetons that the $25,000.00 award of attorney fees was not supported by any hourly records and that it was extremely excessive because this was a "simple foreclosure" and the amount owed by the Templetons was only one-third of the fees awarded.

We fail to understand the Templetons's claim that no records were presented because Arsenal's counsel presented records of hours and fees charged as a witness for Arsenal. Record at 547-59.4/ The Templetons were allowed to conduct extensive cross-examination of Arsenal's counsel as to the validity of these records, record at 559-600, and to present an expert of their own. Record at 827. This case was litigated with vigor by both sides, and we would point out that the amount the Templetons believe they owe Arsenal is quite different from the figure arrived at by the trial court which we now affirm.

No issue exists as to the allowance of attorney fees since the mortgage clearly allows Arsenal to recover these fees. Record at 904. Our review is limited to the reasonableness of the amount awarded, and so we will not alter the award unless the trial court has abused its discretion. See Arnold v. Dirrim, (1979) Ind.App., 398 N.E.2d 426; Fox v. Galvin, (1978) Ind.App., 381 N.E.2d 103. We fail to find any abuse due to the existence of evidence in the record to support the award and the multitude of issues which were raised and/or litigated in this case.

---

4. The trial court decreased the attorney fees from $36,000.00 to $25,000.00 with this statement:

> "Trial Rule 59(J)(3) says the Court may modify or correct and the Court hereby modifies attorneys fees to be $25,000.00 for counsel for plaintiff. Trial Rule 59 states the Court should merely give general reasons. The reasons are as follows: that testimony of plaintiff's own expert witness and two, the difficulty in separating attorneys' time spent on the note and mortgage of the case proper and the time on the ancillary but closely related matters. It's difficult to separate those matters. Those are the two general reasons the Court gives for that."

Record at 1203. We disagree with the Templetons that this statement shows the trial court could not determine what a reasonable fee for this case would be.

X.

The trial court did not err in refusing to award the Templetons's attorney fees. This claim for fees is based on the "obdurate behavior" or "bad faith" exception to the rule that attorney fees are barred absent statutory or contractual provision. See City of Indianapolis v. Central Railroad, (1977) Ind.App., 369 N.E.2d 1109; trans. denied. By finding that the trial court's judgment in favor of Arsenal should be affirmed, we have also found no bad faith which would justify attorney fees for the Templetons. See Issue III.

Arsenal has filed a "Petition for Writ of Certiorari Allowance of Attorneys Fees on Appeal." We therefore order this cause remanded to the trial court for determination of how much, if any, appellate attorney fees are owed to Arsenal pursuant to the note and mortgage.

Judgment affirmed, but remanded for further proceedings consistent with this opinion.

SULLIVAN, J. CONCURS IN RESULT.

SHIELDS, J. CONCURS IN RESULT.

APPENDIX D

STATE OF INDIANA
Clerk of the Supreme Court
And Court of Appeals
INDIANAPOLIS, 46204
Telephone 232-1930
Marjorie H. O'Laughlin, Clerk
217 State House

No. 2-682A155

G.C. Templeton, Jr. et al V. Arsenal Savings Assoc. et al

You are hereby notified that the Court of Appeal

has on this day Appellants petition for Rehearing Denied. Buchanan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 29th day of Aug, 1983

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX E

STATE OF INDIANA
Clerk of the Supreme Court
And Court of Appeals
INDIANAPOLIS, 46204
Telephone 232-1930
Marjorie H. O'Laughlin, Clerk
217 State House

No. 2-682A155

G.C. Templeton, Jr. et al V. Arsenal Savings Assoc. et al

You are hereby notified that the Supreme Court

has on this day Appellants (Templetons) petition for Transfer is hereby Denied. Givan, C.J. All Justices Concur, except Hunter, J. who is not participating.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of Jan, 1984

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals